Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAMS NATURAL GAS COMPANY,

Cross-Petitioner,

v.

AMOCO PRODUCTION COMPANY, ANADARKO PETROLEUM CORPORATION, MOBIL OIL CORPORATION, OXY USA, INC., AND UNION PACIFIC RESOURCES COMPANY,

Cross-Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

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May a Federal Court ignore clearly expressed Congressional intent merely because some of the parties agree to such a result?

LIST OF PARTIES AND RULE 29.6 LISTING

In addition to the parties identified in the caption of this Cross-Petition, the following entities were parties to the proceeding in the Court of Appeals:

Anadarko Petroleum Corporation
Cheyenne Light, Fuel and Power Company
Colorado Interstate Gas Co.
Federal Energy Regulatory Commission
K N Energy Inc.
K N Interstate Gas Transmission Co.
Missouri Public Service Commission
Mobil Oil Corporation
Oxy USA Inc.
Union Pacific Resources Company
Williams Natural Gas Company

Cross-Petitioner Williams Natural Gas Company is a wholly owned subsidiary of The Williams Companies, Inc. Other subsidiaries of The Williams Companies, Inc., that are not wholly owned by that corporation are as follows:

Altra Energy Technologies L.L.C.
American Soda, L.L.P.
Apco Argentina Inc.
Free Port Terminal Co. Limited
Kern River Gas Supply Corp.
Kern River Gas Transmission Co.
Kern River Service Corp.
Kiowa Gas Storage, L.L.C.

Nebraska Energy, L.L.C.
NES Supply Corp.
Northern Border Intermediate Limited Partnership
Northern Border Partners, L.P.
Parkco, L.L.C.
Pekin Energy Co.
Reserveco Inc.
TransNetwork Holding Co.
Tubexpress, Inc.
Williams Field Services-Gulf Coast Co., L.P.
Wiljet, L.L.C.

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No.

IN THE
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WILLIAMS NATURAL GAS COMPANY,

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v.

AMOCO PRODUCTION COMPANY, ANADARKO PETROLEUM CORPORATION, MOBIL OIL CORPORATION, OXY USA, INC., AND UNION PACIFIC RESOURCES COMPANY,

Cross-Respondents.

Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

Williams Natural Gas Company ("WNG") cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit (the "Court of Appeals") in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-30a)[1] is reported at Public Service Co. v. FERC, 91 F.3d 1478 (D.C. Cir. 1996). The Federal Energy Regulatory Commission's decisions (Pet. App. 35a-59a and Cr. Pet. App. 1a-4a) are reported at Colorado Interstate Gas Co., 65 FERC ¶ 61,292 (1993), and Williams Natural Gas Co., 66 FERC ¶ 61,198 (1994). The Commission's orders denying rehearing (Pet. App. 60a-83a and Cr. Pet. App. 5a-16a) are reported at Colorado Interstate Gas Co., 67 FERC ¶ 61,209 (1994), and Williams Natural Gas Co., 67 FERC ¶ 61,292 (1994).

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1996. Timely petitions for rehearing and rehearing *en banc* were denied on November 6, 1996. Pet. App. 31a-34a. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1) (1993).

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[1] With the exception of Williams Natural Gas Co., 66 FERC ¶ 61,198 (1994) (Cr. Pet. App. 1a-4a) and Williams Natural Gas Co., 67 FERC ¶ 61,292 (1994) (Cr. Pet. App. 5a-16a), the materials subject to Rule 14.1(i) were already reproduced in the appendix to the Cross-Respondents' petition in Docket No. 96-954. Consequently, pursuant to Supreme Court Rule 12.5, WNG does not reproduce those materials herein. For the Court's convenience, WNG incorporates by reference the appendix to Cross-Respondents' petition, in Docket No. 96-954. References to Pet. App. are to the Appendix field by Cross-Respondents in Docket No. 96-954. References to Cr. Pet. App. are to Appendix to Cross-Petition for Writ of Certiorari filed herewith.

RELEVANT STATUTES

Pursuant to Rules 12.5 and 14.1(f), WNG incorporates by reference the portions of the Natural Gas Policy Act of 1978 ("NGPA") reproduced in the appendix to Amoco's petition. (Pet. App. 103a-108a).

STATEMENT OF THE CASE

This case presents an important issue concerning a Court's authority and duty to identify and properly apply congressional intent. At issue in this case is the application of certain provisions of the NGPA. By express congressional command, the NGPA became effective on December 1, 1978. The NGPA established an entirely new regulatory regime. Under the NGPA, Congress established maximum lawful prices ("MLP") for gas purchased by interstate pipelines and outlawed the collection of any monies in excess of those maximum lawful prices. 15 U.S.C. § 3411 (1988). Congress did not give the Federal Energy Regulatory Commission ("FERC") the discretion to award refunds as it saw fit, but instead gave customers the unqualified right to obtain refunds for any price charged in excess of the maximum lawful price. 15 U.S.C. § 3413(e)(2)(B) (1988).

Section 110 of the NGPA permitted a gas producer to charge an amount in excess of specified price ceilings to the extent necessary to recover payment of state severance taxes attributable to the production of natural gas. 15 U.S.C. § 3320 (a)(1) (1988). From the NGPA's effective date of December 1, 1978, until January 1, 1993, when natural gas prices were deregulated, Cross-Respondents (collectively, the "Producers") charged pipelines and their customers (including WNG) the maximum lawful price established by Congress plus the

amount of Kansas *ad valorem* taxes paid by the Producers. The Producers viewed the Kansas *ad valorem* tax as a severance tax within the meaning of NGPA § 110.

In 1994, following a lengthy appellate process, FERC ruled that the Kansas tax did not qualify as a severance tax under § 110 of the NGPA, and, therefore, that the Producers' collection of the Kansas tax constituted an unlawful overcharge. (Pet. App. 35a-59a). Nevertheless, despite the clear language of the NGPA, which outlawed the collection of monies in excess of the statutory MLP and mandated refunds of any monies collected in excess of the MLP, FERC determined that it had the discretion not to order refunds for all unlawful collections. (Pet. App. 49a-53a, 75a). FERC reasoned that until 1988, the producers justifiably relied on a prior rule under the NGA (the NGPA 's predecessor), and that it was therefore fair to only award refunds back to that date. (Pet. App. 52a).

The parties sought review of FERC's ruling in the Court of Appeals. Public Service Company of Colorado ("PSCC"), and the Missouri Public Service Commission ("MoPSC") as intervenor, challenged FERC's authority to limit the retroactivity of the producers' liability for refunds of the Kansas tax. The Producers challenged FERC's decision that the Kansas tax constituted a property tax, rather than a severance tax collectable under NGPA. In addition, the Producers argued that FERC's decision constituted a change in the law that should be applied prospectively only. WNG defended the MoPSC's challenge to FERC's determination that pipelines should not be guarantors of refunds.

The Court of Appeals upheld the portion of FERC's decision determining that the Kansas tax was a property tax

collected in violation of the NGPA. The Court of Appeals also held that FERC did not have the discretion to limit the refunds to 1988, and therefore overturned FERC's ruling that the Producers were only required to refund taxes collected since June 1988. In its decision, the Court of Appeals recognized that, because the NGPA established maximum lawful prices and gave customers a right to a refund of all overcharges, FERC did not have the discretion to limit refunds. (Pet. App. 22a). The court correctly held that FERC's reliance on the NGA was misplaced because the NGPA constituted an entirely new regulatory regime. Despite a lengthy retroactivity analysis, the Court recognized that customers were entitled to a full refund of all Kansas *ad valorem* taxes collected after the effective date of the NGPA in 1978.[2]

Despite concluding that the NGPA required a refund of all the Kansas taxes recovered since the NGPA's enactment in 1978, the Court of Appeals held that it was constrained to only award refunds back to October 1983. (Pet. App. 24a, 29a). The court based its decision on a concession in PSCC's Petition for Rehearing before FERC that the date on which interested parties received notice should control the date of retroactivity. (Pet. App. 19a-20a).[3] The Court concluded that

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[2] The Court of Appeals stated that "anything short of full retroactivity (i.e., to 1978) allows the producers to keep some unlawful overcharges without any justification at all." (Pet. App. 24a). The Court further stated that "[t]here is no substantive reason . . . to deny customers all the relief to which they are entitled." (Pet. App. 28a-29a).

[3] The Court of Appeals acknowledged that PSCC argued for full retroactivity to 1978 before it and before FERC. (Pet. App. 19a). Furthermore, the Court of Appeals acknowledged that MoPSC argued for full retroactivity back to 1978, but held that MoPSC was precluded from raising that argument because it did not make a retroactivity argument in its

there was no controversy regarding retroactivity back to 1978 and that it was therefore constrained to only order refunds back to 1983 even though Congress clearly intended to require refunds back to 1978. (Pet. App. 28a-29a).

The Court of Appeals denied timely petitions for rehearing and suggestions for rehearing *en banc* filed both by FERC and by the Producers. Pet. App. 31a-33a. The Court also denied a petition for rehearing filed by PSCC, which asked the Court to reconsider its holding denying refunds back to 1978. Pet. App. 34a. WNG filed in support of PSCC's petition for rehearing. The Producers' Petition for Writ of Certiorari was docketed in this Court December 16, 1996 and the date for responses was extended to February 14, 1997.

REASONS FOR GRANTING THE CROSS-PETITION

Summary of Argument

The Court of Appeals refused to apply clear Congressional intent. The court acknowledged that the NGPA required a refund of all the Kansas taxes collected by the producers since the NGPA's enactment in 1978. Notwithstanding the clarity of the legislature's intent, the court allowed itself to be controlled by a perceived stipulation (by PSCC) as to a question of law, and consequently limited the customers' recovery to taxes paid since October 1983. (Pet. App. 24a, 28a-29a). This case thus presents an important question of federal separation of powers. The question has a

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request for rehearing before the Commission, and made its request before the Court of Appeals only as an intervenor and not as a petitioner. (Pet. App. 20a).

significant impact and broad application and the Court should therefore grant this Cross-Petition.

The Court of Appeals' decision directly conflicts with decisions of this Court and other United States Courts of Appeal regarding the judiciary's authority and duty to apply the law as enacted by the legislature. Moreover, this case presents extremely important issues because of the dangerous precedent the Court of Appeals' decision will set if allowed to stand. The Court of Appeals' decision stand, threatens the constitutionally mandated separation of powers by allowing the courts to invade the exclusive province of Congress.

I. THE COURT OF APPEALS WAS NOT LIMITED TO THE LEGAL THEORIES ADVANCED BY THE PARTIES BELOW.

The specific issue of how far back to award refunds under the NGPA was clearly before the court, yet the court held that it was powerless to award refunds back to 1978. Consequently, the decision below conflicts with decisions of this Court holding that "when an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., 508 U.S. 439, 446 (1993); Kamen v. Kemper Fin. Serv., Inc., 500 U.S. 90, 99 (1991).

The issue of whether a court retains the independent power to identify and apply the governing law is very important. By allowing the decision below to stand, this Court will be effectively acknowledging a limitation on a court's power to apply clearly expressed legislative intent. Such

precedent would have impact upon courts nationwide regarding the entire range of Congressional activity. This Court should give the lower courts guidance on applying the intent of Congress.

II. THE COURT OF APPEALS WAS CHARGED WITH THE DUTY TO APPLY THE LAW AS ENACTED BY CONGRESS.

In the decision below, the Court of Appeals blatantly failed to follow the governing law. Therefore, the decision below directly conflicts with one of the most basic rules of law. It is axiomatic that it is a court's duty to apply the law. See Kamen, 500 U.S. at 99; see also Maryland Dep't of Educ. v. Department of Veterans Affairs, 98 F.3d 165, 168 (4th Cir. 1996) ("courts are charged with the duty to apply the law that Congress enacted."); Phico Ins. Co. v. Providers Ins. Co., 888 F.2d 663, 665 (10th Cir. 1989) (it is the court's duty to apply the proper substantive law).

Obviously, it is important that the courts strictly adhere to their duty to apply the law as enacted by Congress. Any precedent to the contrary would most certainly have a tremendous impact on the courts and the public in general. This case is more troublesome than most. Here, the Court of Appeals openly acknowledged that it was allowing the Producers to keep "unlawful overcharges without any justification at all." (Pet. App. 24a). The decision below directly conflicts with decisions of this Court because it recognizes clear legislative intent, yet declines to put that intent into effect. The issue is an important one, which not only involves how a court applies the law, but also involves the fundamental integrity of our federal constitutional separation of powers. See generally O'Donoghue v. United States, 289

U.S. 516 (1932); Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995).

This Court has expressly recognized the extreme importance of issues involving the integrity of the separation of powers, and because of this importance, has heard these issues even when they were not raised in the court below.

> It is true that, as a general matter, a litigant must raise all issues and objections at trial. But the disruption to sound appellate process entailed by entertaining objections not raised below does not always overcome what Justice Harlan called "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers."

Freytag v. Commissioner of Internal Revenue, 501 U.S. 868, 879 (1991). Because the federal judiciary has a "strong interest" in constitutional separation of powers, the Court should grant this Cross-Petition to consider that important question.

III. THE COURT OF APPEALS' RESOLUTION OF QUESTIONS OF LAW SHOULD NOT HAVE BEEN IMPACTED BY STIPULATIONS OF THE PARTIES.

PSCC's "concession" regarding the date that should control the issue of retroactivity concerned a question of law. See Pet. App. 19a-20a. The question of retroactive application is a question of law for the court. See Retail Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir.

1972). The Court of Appeals allowed itself to be bound by what amounts to a party's stipulation to a question of law.

The decision below directly conflicts with decisions of this Court that hold a court is not controlled by an agreement of the parties on a question of law, and that such stipulations are invalid and ineffective. Case v. Los Angeles Lumber Prod. Co., 308 U.S. 106, 114 (1939); see Swift & Co. v. Hocking Valley R. R. Co. 243 U.S. 281, 289 (1917) (a stipulation does not foreclose legal questions); see also Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 152 (1942) (applying the same rule to legal conclusions arising from stipulated facts); Commissioner v. Ehrhart, 82 F.2d 338, 339 (5th Cir. 1936). The issue presented here is one of great public importance. Moreover, the decision of the Court of Appeals conflicts with the decisions of this and other federal courts holding that stipulations on questions of law are ineffective.

IV. THE COURT OF APPEALS HAD NO AUTHORITY TO DEPART FROM THE CONGRESSIONAL COMMAND SETTING THE EFFECTIVE DATE OF THE NGPA.

"When Congress enacts a new statute, it has the power to decide when the statute will become effective." Rivers v. Roadway Express, Inc., 511 U.S. 298, 313 n. 12 (1994). In the present case, the Court of Appeals completely ignored Congress' command setting the NGPA's effective date at December 1, 1978, and created its own effective date of October 1983. Consequently, the decision below directly conflicts with decisions of this Court holding that "in statutory cases the court has no authority to depart from the congressional command setting the effective date of a law that it has enacted." Id.; see also Collins v. Hardyman, 341 U.S.

651, 663 (1950) (holding "it is not for [the] Court to compete with Congress or attempt to replace it as the nation's law-making body"). No decision of this Court has provided an exception to that rule in a case where one party concedes such a result.

If allowed to stand, the Court of Appeals' decision would constitute direct authority giving courts the unbridled power to ignore Congress in direct conflict with this Court's prior decisions. Such a ruling could have a profound impact on the interpretation of virtually every act of Congress. The public importance of that result is obvious.

CONCLUSION

The decision below directly conflicts with numerous decisions of this Court and other courts regarding the judiciary's authority and duty to follow clearly expressed legislative intent. Furthermore, this case presents an important question of federal law related to the complimentary roles of the legislature and the judiciary. A decision that permits the courts to invade the province of Congress to legislate will have far-reaching impact on every area in which Congress acts. This Court should grant WNG's Cross-Petition to protect the federal judiciary's strong interest in maintaining constitutional separation of powers.

Respectfully submitted,

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January 31, 1997

APPENDICES

APPENDIX A

BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. TA89-1-43-000, -003, and RP89-39-001

WILLIAMS NATURAL GAS COMPANY

(Issued February 15, 1994)

LETTER ORDER

By Direction of the Commission: Lois D. Cashell, Secretary

Reference: (A) Revised Eleventh Revised Sheet No. 6 and Revised Tenth Revised Sheet No. 7 to FERC Gas Tariff, Original Volume No. 1; (B) May 30, 1989, Annual PGA supplemental information and July 29, 1989, revised magnetic tape filings.

The Commission accepts the tariff sheets listed in (A) above and the supplemental information filings listed in (B) above effective May 1, 1989. The filing is pursuant to the Commission order issued April 27, 1989, in Docket Nos. TA89-1-43-000 and RP88-39-001 (April 27 order). 47 FERC ¶ 61,114 (1989). The technical conference instituted in that

proceeding is terminated. Such acceptance is subject to Williams Natural Gas Company (WNG) refunding the Kansas ad valorem tax amounts to its customers in conformance with the Commission's orders in Docket Nos. GP83-11-002 and RI83-9-003. See 65 FERC ¶ 61,202 (1993), reh'g pending.

The April 27 order accepted and suspended WNG's annual PGA filing of March 1, 1989, in Docket No. TA89-1-43-000, to be effective May 1, 1989, subject to refund and subject to the outcome of the proceedings in related dockets. The filing was also made subject to the following conditions:

> (1) a technical conference being convened to permit parties to address their concerns with the filing;
>
> (2) WNG filing revised tariff sheets to reflect the removal of any costs necessitated by the Commission's action in Docket No. RP89-140-000;
>
> (3) WNG filing additional supporting information, within 30 days of the date of the order; and
>
> (4) WNG submitting a corrected magnetic tape version of its filing.

On May 30, 1989, WNG filed revised tariff sheets in Docket No. TA89-1-43-003, to reflect the removal of the jurisdictional portion of approximately $18.7 million of settlement pricing dispute payments. WNG had also filed for the recovery of these same settlement pricing dispute payments in its filing in Docket No. RP89-140-000. By order issued on

April 28, 1989, in Docket No. RP89-140-000, et al.,[1] the Commission directed WNG to remove, within 30 days of the date of the order, the settlement pricing dispute payments either from its Order No. 500 [FERC Stats. and Regs., Regs. Preambles 1986-1990 ¶ 30,761] filing in Docket No. RP89-140-000, or the instant annual PGA filing. WNG also included the supplemental information required by the April 27 order in its May 30 filing.

On July 21, 1989, WNG filed a new magnetic tape filing as required by the April 27 order.

Kansas Power and Light Company and Missouri Public Service Commission (referred to as Joint Commenters), filed position papers to the technical conference taking issue with certain aspects of WNG's PGA filing. Since WNG has restructured its system, effective October 1, 1993, pursuant to Order No. 636 [FERC Stats. and Regs. ¶ 30,939][2] and has terminated its PGA, the issues raised by Joint Commenters relating to (1) WNG's allocation of costs associated with storage losses, lost, unaccounted-for, and fuel gas, and net storage, transmission, and exchange transactions on its system, and (2) WNG's amortization of its Account No. 191 costs over a longer period of time than provided for in WNG's tariff and to customers other than provided for in WNG's tariff have been rendered moot. Any remedies such as Joint Commenters are seeking could only be implemented on a prospective basis and the PGA mechanism has been terminated.

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1 47 FERC ¶ 61,155 (1989).

2 65 FERC ¶ 61,221 (1993).

Notices of intervention and unopposed timely filed motions to intervene are granted pursuant to the operation of Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR § 385.214). Any opposed or untimely filed motion to intervene is governed by the provisions of Rule 214.

This acceptance for filing shall not be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended, nor shall it be construed as constituting approval of the referenced filing or of any rate, charge, classification, or any rule, regulation, or practice affecting such rate or service contained in your tariff; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company.

APPENDIX B

BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. TA89-1-43-004 and RP89-39-005

WILLIAMS NATURAL GAS COMPANY

(Issued June 2, 1994)

ORDER GRANTING IN PART AND DENYING IN PART REHEARING AND REJECTING MOTION FOR SUMMARY JUDGMENT AND PROVIDING NOTICE TO COLORADO AND WYOMING PRODUCERS OF FURTHER PROCEEDINGS

Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.

On March 17, 1994, the Missouri Public Service Commission (Missouri PSC) filed a request for rehearing of a Commission letter order issued February 15, 1994,[1] accepting

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[1] Williams Natural Gas Co., 66 FERC ¶ 61,198 (1994).

certain tariff sheets and supplemental information filed by Williams Natural Gas Company (Williams), and terminating a technical conference. For the reasons discussed below, the Commission grants in part and denies in part the request for rehearing. The Commission also rejects a motion for summary judgment of one of the issues raised in the rehearing, and issues a notice of further proceedings.

Background

On March 1, 1989, Williams submitted its proposed annual adjustment to its PGA clause in Docket No. TA89-1-43-000, to be effective May 1, 1989.[2] Reflected in the PGA, inter alia, was $18,087,099 in payments that Williams made to its producer-suppliers to reimburse them for their payments of ad valorem taxes to Kansas, Colorado, and Wyoming. The producers had charged these amounts to Williams as an add-on to the ceiling prices permitted by Section 110 of the Natural Gas Policy Act (NGPA).[3] Williams reflected these amounts in its PGA as net adjustments to its unrecovered gas costs. Several protesters claimed that the ad valorem tax reimbursements could be contract reformation

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[2] Williams also filed tariff sheets in Docket No. RP88-39-000 to eliminate its standby service rates.

[3] Section 110 of the NGPA permitted producers to charge as an add-on to the maximum lawful price "State severance taxes attributable to the production of such natural gas." 15 U.S.C. 3320(a). All NGPA price ceilings were eliminated as of January 1, 1993.

costs that should not be reflected in Williams' PGA. By order issued April 27, 1989, the Commission accepted and suspended the filing subject to a technical conference to address this and other issues, and subject to Commission "review of the additional information requested regarding ad valorem tax reimbursements and pricing dispute settlements."[4] The suspension order stated that these costs related to taxes assessed by the states of Kansas, Colorado, and Wyoming. On May 30, 1989, Williams filed revised tariff sheets to comply with the directives in the April 27, 1989 order.

The technical conference was held in 1989, but Staff held its report in abeyance while the issue of whether certain Kansas ad valorem taxes were severance taxes eligible for recovery under NGPA Section 110 was being decided in another case before the Commission. In 1988, in Colorado Interstate Gas Company (CIG)[5] the U.S. Court of Appeals for the D.C. Circuit had remanded to the Commission the issue of whether the Kansas ad valorem tax was a severance tax qualifying under NGPA Section 110 as an add-on to the maximum lawful price. On December 1, 1993, the Commission issued its order in the CIG case.[6] On remand, the Commission stated that, to determine if a tax was a "severance tax" for purposes of NGPA Section 110, there had to be a

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[4] Williams Natural Gas Co., 47 FERC ¶ 61,114 at 61,340 (1989); reh'g 48 FERC ¶ 61,017 (1989).

[5] Colorado Interstate Gas Co. v. FERC, 850 F.2d 769 (D.C. Cir. 1988).

[6] 65 FERC ¶ 61,292 (1993); reh'g denied 67 FERC ¶ 61,209 (1994).

systematic analysis of whether the tax is more like a severance tax on the production of gas as opposed to a personal property tax on the value of the gas remaining in the ground or on other production assets of the lease. The Commission found that the Kansas ad valorem taxes are not a tax on production and thus do not qualify as severance taxes recoverable under NGPA Section 110. Accordingly, the Commission ordered all Kansas producers that had unlawfully charged any interstate pipeline for such taxes after the June 28, 1988 date of issuance of the Court's decision in the CIG case, to repay the excess over the maximum lawful price to the pipelines, and for the pipelines to pass those refunded costs along to its customers.

Missouri PSC sought clarification of the Commission's statement in CIG that it would not require that pipelines be guarantors of refunds of the Kansas ad valorem taxes. Missouri PSC asked the Commission to clarify that it was not prejudging the merits of this issue in the instant Williams case. Missouri PSC argued that, because Williams' instant rates were protested and accepted subject to refund, Williams could have taken steps to protect itself, such as establishing an escrow account to ensure that it would be able to account for tax reimbursements. In the order on remand in CIG, the Commission found that this issue would be addressed in the instant proceeding, based upon the rulings in the CIG proceeding.[7]

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[7] 67 FERC ¶ 61,209, at fn. 46 (1994).

Following the CIG order, the Commission, by the February 15, 1994 letter order, accepted Williams' revised tariff sheets in this case. The Commission also accepted the supplemental information filed by Williams on May 30, 1989, subject to Williams refunding the Kansas ad valorem taxes reflected in its filing according to the methodology set out in CIG, and the Commission terminated the technical conference. The Commission held that all other issues addressed in the technical conference regarding Williams' PGA are now moot, since Williams no longer has a PGA mechanism after restructuring.

Rehearing

On March 17, 1994, the Missouri PSC filed for rehearing of the February 15, 1994 letter order. Missouri PSC argues that, while the issue of the Kansas ad valorem taxes may have been resolved by the Commission's decision in CIG, Williams' PGA also included payments made by Williams to producers to reimburse them for Colorado and Wyoming ad valorem taxes. Missouri PSC argues that the issue as to whether the Colorado and Wyoming taxes are severance taxes under NGPA Section 110 has never been addressed. Accordingly, Missouri PSC argues that the Commission should not have accepted the compliance tariff sheets or terminated the refund obligation in this proceeding until the Commission has determined whether Colorado and Wyoming ad valorem taxes were eligible for recovery under NGPA Section 110.

Missouri PSC also claims that the refund methodology in CIG should not be applied here because the circumstances

in the instant case differ from those in CIG. Missouri PSC contends that, in CIG, the Commission found that Kansas first sellers of gas that collected revenues in excess of the NGPA maximum lawful price as a result of the reimbursement of the Kansas taxes had to refund those amounts, with interest, to their customers, and that the pipeline was then to flow the refunds through to its customers through a lump-sum payment. Missouri PSC contends that the refund liability in CIG was contingent upon the pipelines' recovery of the subject costs from its suppliers. Missouri PSC claims that the subject tariff sheets in the instant proceeding were accepted subject to refund, and that such refund should not be contingent on Williams receiving any refunds of the costs from producers. Missouri PSC claims that it does not matter when Williams paid the related taxes to its suppliers. The issue, contends Missouri PSC, is that Williams included these taxes in its rates that are subject to refund. Accordingly, Missouri PSC argues that the Commission should order Williams to immediately refund amounts collected from its customers for the unlawful reimbursements of Kansas property taxes.

Motion

Missouri PSC also filed a motion for summary judgment in this proceeding on March 17, 1994, arguing that there is no material question of fact or law in this proceeding regarding the Kansas property taxes, and repeats the arguments made on rehearing regarding the need for immediate refunds by Williams of amounts it paid to reimburse producers for Kansas ad valorem taxes. Therefore, Missouri PSC moves that the Commission immediately order Williams to immediately

calculate the amount of Kansas property taxes recovered in its rates subject to refund, and to promptly refund those amounts.

On April 1, 1994, Williams filed an answer to Missouri PSC's motion, arguing that the motion is a collateral attack on CIG, and is an attempt to induce the Commission to amend the CIG order, or to misapply it to the instant proceeding. Williams contends that the CIG order was a broad industry-wide determination that established refund procedures applicable to all pipelines reflecting Kansas ad valorem taxes in their rates. Williams contends that the Commission's letter order in the instant proceeding confirmed that the CIG ruling is fully applicable to Williams, and that the ruling should be applied to all pipelines in a uniform, non-discriminatory manner. Williams states that the Commission determined in CIG that pipelines will not be required to be guarantors of refunds from producers, even in situations similar to the instant case. Williams contends that Missouri PSC is wrongfully attempting to overturn that determination. Williams also claims that this determination that pipelines should not be guarantors of refunds is consistent with the Commission's determinations in other producer refund situations where rates were accepted subject to refund.[8] Williams also argues that it would be unfair

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[8] Citing Refunds Resulting from Btu Measurement Adjustments, Order No. 399, FERC Stats. and Regs., Regs. Preambles 1982-1985, ¶ 30,597 at 31,154, reh'g Order No. 399-A, FERC Stats. and Regs., Regs. Preambles 1982-1985, ¶ 30,612 (1984), vacated in part on other grounds, Interstate Natural Gas Ass'n of America v. FERC, 756 F.2d 166 (D.C. Cir. 1985), cert. denied sub nom., Pennzoil Co. v. Associated Gas Distributors, 474 U.S. 847 (1985).

for the Commission to order it to pay refunds before it collects these payments from its producers.

Discussion

Further Proceedings

The Commission agrees with Missouri PSC that there are issues in the instant proceeding that had not been resolved when the Commission issued its February 15, 1994 letter order terminating the technical conference in this proceeding. First, the issue remains as to whether the Wyoming and Colorado ad valorem taxes paid by Williams to its producer-suppliers are production taxes that producers in these states could recover from their customers as an add-on under NGPA Section 110 to the otherwise applicable maximum lawful price. The issue must still be addressed by the Commission pursuant to the standards established by the Commission in its order on remand in CIG. If the severance taxes are so recoverable by the producers, then they were properly paid to the producers by Williams and did qualify as gas costs recoverable under Williams' PGA. If they were not so recoverable, then the producers could be required to refund these amounts and issues would arise as to Williams' right to recover the amounts in its PGA. Accordingly, the Commission grants in part rehearing, and reverses its decision to terminate this proceeding.[9]

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[9] Missouri PSC has not shown a reason why it was error to accept the tariff sheets in the February 15, 1994 order. As the Commission is not terminating the proceeding, the rates reflected in such tariff sheets remain subject to refund.

The Commission also finds that additional information and briefing is necessary in order to decide the remaining issues of whether the Wyoming and Colorado ad valorem taxes are severance taxes eligible to be recovered by first sellers under NGPA Section 110 as an add-on to the maximum lawful, first-sale, ceiling price. The Commission finds that fairness dictates that Williams and its Wyoming and Colorado producers be allowed to address the Commission's recent decision in CIG as it applies to the instant proceeding, and more specifically, as it applies to the Wyoming and Colorado ad valorem taxes. In CIG, the Commission established a test to use in determining whether a state tax qualifies as a severance tax that would be includable as a gas cost under the NGPA. The Commission directs Williams to submit to the Commission, within 20 days of the date of this order, a filing that sets forth: (1) the amounts of Wyoming and Colorado ad valorem taxes reflected in Williams' PGA filings beginning with the rates in the instant proceeding and ending on the December 31, 1992 expiration date of the NGPA ceiling rates; and (2) the text of the state laws or regulations pertaining to the taxes at issues. Producers that recovered the Wyoming and Colorado ad valorem taxes are invited to intervene in this proceeding within 40 days of the date of this order. In addition, within 40 days of the date of this order, Williams must (and any producer wishing to do so may) file an analysis of why the Wyoming and Colorado ad valorem taxes qualify for recovery under the CIG test, and thus were properly includable in Williams' PGA filing. Parties to this proceeding are invited to file answers to Williams' filing within 60 days of the date of this order.

Refunds

The Commission denies in part rehearing as it applies to Missouri PSC's request that partial refunds be immediately ordered for the full amount of the Kansas ad valorem taxes reflected in the filing. The Commission made a ruling in CIG as to how these taxes were to be refunded by the producers to the pipelines (including Williams) and then, in turn, by the pipelines to their customers. The finding in CIG as it applies to Williams, will not be overturned here.

The only difference that Missouri PSC points out between the CIG case and the instant case is that in the instant case the rates were accepted subject to refund. The Commission fails to see why that would dictate the outcome Missouri PSC requests. The acceptance of certain rates subject to refund does not determine the manner in which the Commission will order that those refunds be made. While Missouri PSC did protest the inclusion of ad valorem taxes in Williams' instant PGA filing, and the Commission did accept that filing subject to refund, that is not to say that if the Commission found that such taxes were not a production cost that the pipeline must deduct them entirely even before it had recovered these costs from its producers. Rather, the acceptance subject to refund meant that the Commission would order whatever refunds it found to be appropriate when it made a determination on the underlying issue. The Commission made that determination in CIG.

The Commission did state, in its order on remand in CIG, that refunds would be appropriate from the date producers "could have taken steps to protect themselves, such as establish

an escrow account for such tax reimbursement,"[10] but that reference was to the effective date of refunds and not to the issue of whether the pipeline must guarantee all refunds. Further, Williams merely included in its PGA filing the tax costs that it had paid to its producers. Hence, there would be no additional revenues for Williams to put into an escrow account. The producers, on the other hand were recovering unlawful tax costs, the proceeds of which could have been set aside for future refund obligations. Therefore, there is no reason why Williams should guarantee refunds when the Commission has found in CIG that other pipelines did not have that same obligation. Accordingly, the Commission finds that the instant case is not different from the CIG case in a manner that would require that the Commission to order refunds in a manner that is inconsistent with our decision in CIG. As the Commission has denied this request for rehearing regarding refunds, the Commission will reject the motion for summary judgment as moot.

The Commission orders:

(A) Notice is hereby provided to all producers in Colorado and Wyoming that a proceeding is being instituted in this docket to determine if the ad valorem taxes of those two states are recoverable as production costs. Producers that recovered the Wyoming and Colorado ad valorem taxes may file to intervene in this proceeding within 30 days of the date of this order.

(B) Rehearing is granted in part, in that the instant proceeding is not terminated.

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[10] 65 FERC at 62,373.

(C) Rehearing is denied in part, in that the Commission will not order further refunds in this case at this time.

(D) Missouri PSC's motion for summary judgment is rejected.

(E) Williams is directed to file, within 20 days of this order:

> (1) the dollar amounts of Wyoming and Colorado ad valorem taxes reflected in the subject filing and subsequent PGA filings through the December 31, 1992 expiration date of the NGPA ceiling prices; and
>
> (2) the text of the state laws or regulations pertaining to the Wyoming and Colorado ad valorem taxes at issues; and

(F) Williams is directed to file, within 40 days of this order, an analysis, under the CIG test, of why those taxes qualify for recovery in the instant PGA filing.

(G) Within 40 days of the date of this order, producers that recovered the Wyoming and Colorado ad valorem taxes are invited to intervene in this proceeding, and are also invited to file their analysis of why those taxes qualify for recovery in the instant PGA filing under the CIG test.

(H) Parties to this proceeding may file answers to Williams' filing within 60 days of the date of this order.

By the Commission.
(S E A L)

/s/ Lois D. Cashell